

FILED

NOT FOR PUBLICATION

APR 18 2005

UNITED STATES COURT OF APPEALS CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHEN HAYDEN,

Petitioner - Appellant,

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent - Appellee.

No. 03-73668

Docket No. 10441-01

MEMORANDUM*

Appeal from a Decision of the

United States Tax Court

Submitted April 14, 2005**
San Francisco, California

Before: GOODWIN, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Stephen Hayden appeals a tax court decision upholding the Commissioner's determination of deficiencies in his 1997 and 1998 federal income tax in the amounts of \$102,731 and \$26,347, respectively.

Because the long-term disability insurance payments that Hayden received in 1997 and 1998 were calculated with reference to his pre-disability earnings rather than to the nature of his injury and his eligibility to receive benefits was contingent upon his absence from work, the payments constituted gross income under 26 U.S.C. § 105(a) and did not qualify for exception under 26 U.S.C. § 105(c). *See Beisler v. Commissioner*, 814 F.2d 1304, 1307-08 (9th Cir. 1987) (en banc). The tax court correctly upheld the Commissioner's deficiency determination.

AFFIRMED